Supreme Court, U. S.
FILED
MAR 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
No. 75-1176

JOSEPH M. KADANS,

Appellant,

vs.

STATE BAR OF NEVADA,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

JOSEPH M. KADANS,
3519 Thom Boulevard
Las Vegas, Nevada 89106

Counsel for Appellant.

SUBJECT INDEX

	Page
Brief in Opposition to Motion to Dismiss	1
Argument	1
Conclusion	15
Certificate of Service	15

TABLE OF AUTHORITIES

Cases

Barbier v. Connolly, 113 U.S. 27.	13
Berger v. Board of Psychologist Examiners, 521 F 2d 1062	11, 12, 14
Cleveland Board v. Lafleur, 414 U.S. 632	11
Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311	14
Herb v. Pitcairn, 324 U.S. 117	7
Largent v. Texas, 318 U.S. 418	7
Lathrop v. Donohue, 367 U.S. 820	8
Oxley Stave Co. v. Butler County, 166 U.S. 648	6
Schware v. Board of Bar Examiners, 353 U.S. 232, 239	10
Stanley v. Illinois, 405 U.S. 645	11
Vlandis v. Kline, 412 U.S. 441	2, 11

Rules

Nevada Supreme Court Rule 42(4).	2
Nevada Supreme Court Rule 51(6).	2
Nevada Supreme Court Rule 72.5	5

UNITED STATES CODE

Title 28, sec. 1343(3)	4
Title 42, sec. 1983	5

TEXTBOOKS

Supreme Court Practice by Sterm & Gressman	7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1176

JOSEPH M. KADANS,

Appellant,

VS.

STATE BAR OF NEVADA,

Appellee.

BRIEF IN OPPOSITION
TO MOTION TO DISMISS

This memorandum brief is filed merely for the convenience of the Court, answering the points raised by the Appellee in the Motion to Dismiss.

I - CONTENTION OF APPELLEE THAT FEDERAL QUESTIONS WERE NOT RAISED IN LOWER COURT.

The Appellee has moved for dismissal "on the ground that the questions presented have not been raised below * * *."

The 14th Amendment to the United States Constitution, prohibiting any State from depriving any person of life, liberty or property without due process of law and prohibiting the denial of equal protection of the laws has been mentioned in several places in the original Petition filed with the Nevada Supreme Court:

Page 1 of Petition: Par. 4 on Page 1 of the

Petition states:

> "4. Petitioner will set forth is belief that he has been deprived of both State and Federal rights and therefore Petitioner petitions this Honorable Court for a redress of his grievances."

P. 3 of the Petition, starting on Line 16, makes the specific charge that Nevada law(Supreme Court Rule 51(6), in combination with Supreme Court Rule 42(4)) is a violation of due process of law, stating as follows:

> "In the case of Vlandis v. Kline, decided June 11, 1973 and found in 412 U.S. 441, 93 S. Ct. 2230, 37 L Ed 2d 63, the United States Supreme Court held that it was a violation of due process of law for any State to establish a permanent irrebuttable presumption. In a dissenting opinion, Chief Justice Burger, who was joined in the dissent with Justice Rehnquist, stated that the effect of the decision was to nullify rules or laws of States that barred from admission to practice 'persons who do not graduate from accredited schools of law and medicine.'
>
> "The fault in the Nevada Supreme Court Rule is that, in effect, the Nevada rule creates a permanent irrebuttable presumption that Petitioner is not fit to practice law, despite the fact that Petitioner practiced law successfully for many years in both Maryland and Michigan since 1943. Obviously, the Nevada Rule needs to be modified to conform with the decision in the aforementioned case."

(Nevada Supreme Court Rule 42(4), referred to on Page 3 of the Petition, requires attorneys moving to Nevada from other State, to be examined and to make application "in the same manner as all other applicants.")

BEST COPY AVAILABLE

P. 4 of Petition has this heading at the very top of the page:

"EQUALITY UNDER THE LAW"

The Nevada Supreme Court, as well as the Appellee could have made no mistake in associating this statement with the 14th Amendment, which refers to the equal protection of the laws.

Furthermore, Page 4 of the Petition, immediately following the aforecaption heading, complains that while denying to Appellant the right to take the Nevada Bar examination, the Nevada Supreme Court allowed other individuals, who has also failed to attend or to graduate from an ABA accredited law school, to take the Nevada bar examination and to be admitted to the Nevada Bar, a clear and obvious violation of the 14th Amendment.

From Page 4 of Petition:

> "Clarence A. Nelson, Jr., now a practicing attorney in Las Vegas, Nevada, did not graduate from an ABA-approved law school and was admitted to practice by the Nevada Supreme Court and Peter Burleigh, now a practicing attorney in Las Vegas, Nevada, also did not graduate from an ABA-approved law school. Neither the law school of Nelson nor the law school of Burleigh has ever been approved by the American Bar Association."

(These two admissions took place after the Appellant had first applied to take the Nevada bar examination in 1963.)

Page 4 of the Petition also points out that there has been an "unequal application of the law to Petitioner." This obviously a reference to the Federal right of the Petitioner (Appellant) under the 14th Amendment of the United States Constitution. (Line 22 of Page 4)

Furthermore, Lines 28 to 31 of Page 4 of the Petition again claim certain Federal rights as follows:

> " * * * tne denial was due to an unfortunate application of a law that is now clearly void and unconstitutional both as to the State of Nevada and United States Constitutions as denying due process of the law and equal rights under the law."

Page 5 of the Petition again refers to Federal rights to which Petitioner claims to be entitled and which were being denied to him:

> "It has already been mentioned that Petitioner believe s that he has been deprived unlawfully of his rights under the Nevada and United States Constitutions with respect to due process of law and equal justice under the law."

The Petition, page 5, also refers to a Federal statute existing to redress the deprivation of Federal rights and petitions the Nevada Supreme Court to grant the relief without the necessity for the use of the Federal statute:

> "With reference to Federal law, Petitioner refers to 28 United States Code, Section 1343(3) which allows Federal district courts to redress the deprivation of any right, privilege or immunity under color of any State law. Petitioner is confident that the Nevada Supreme Court will redress the obvious wrong done to Petitioner without the necessity for resort to the Federal Courts."

Additionally, another Federal statute is brought to the attention of the Nevada Supreme Court in the original Petition on Page 5 thereof, in the following manner: (Lines 16 to 27)

> "42 United States Code, 1983 allows suits to be brought for redress of parties injured as a result of the loss of rights, privileges or immunities secured by the Constitution under color of State law. Hopefully, Petitioner recognizes the learning and fairness of the present members of the Nevada Supreme Court and is confident that recourse to the Federal Courts will not be necessary. Petitioner is hopeful that it will be recognized that he has been the victim of invidious discrimination and that he has been denied the minimum standards of due process, now made clear by the decision of Vlandis v. Kline, supra."

Appellant, in the original Petition, under the heading of "RELIEF CLAIMED" urged the Nevada Supreme Court to either modify the Court Rules to allow Petitioner-Appellant to be admitted under Nevada Supreme Court Rule 72.5, inasmuch as Petitioner-Appellant is the Dean of the Institute of Advanced Law Study or to allow Petitioner "to take the next scheduled Nevada bar examination."

Starting on Page 5 of the Petition and concluding on Page 6, the wording is as follows:

> "RELIEF CLAIMED
> "Petitioner believes that he is clearly entitled to be admitted to the practice of law under Supreme Court Rule 72.5 or under a slight modification of that Rule which the Nevada Supreme Court has authority to do.
> Alternatively, Petitioner respectfully prays this Honorable Court, notwithstanding Supreme

Court Rules for the payment of an application fee, already paid by Petitioner several years ago or other qualification rules other than rules relating to investigation of character and ethical conduct, to issue an Order allowing Petitioner to take the next scheduled Nevada bar examination."

II - THE OXLEY STAVE CASE IS EASILY DISTINGUISHED FROM THE CASE AT BAR.

Appellee relies heavily upon the case of Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 in support of its contention that federal questions were not raised sufficiently in the lower court.

The Oxley Stave Case, supra, can be easily distinguished from the case at bar. In Oxley, the Supreme Court found, in an opinion delivered by Mr. Justice Harlan, that there was not "specially set up a right or immunity under the 14th Amendment of the Constitution of the United States, forbidding a state to deprive any person of his property without due process of law."

While in the case at bar, there are numerous references to rights of the Appellant under the Federal Constitution, the Supreme Court held in the Oxley Case:

> "Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the supreme court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege, or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

It is clearly evident, in the case at bar, that the Nevada Supreme Court was aware that a Federal question relating to interpretation of the 14th Amendment was involved.

Should this Honorable Court have any doubt that the Nevada Supreme Court was unaware of the presentation to it of any Federal question, the Appellant herein, acting in proper person as a member of the Bar of the Supreme Court of the United States, does hereby make request for continuance of this cause so that a certificate may be obtained from the Nevada Supreme Court to clarify any ambiguity that may exist concerning this point of law. This Court, in Herb v. Pitcairn, 324 U. S. 117, 128 has indicated that such a step may be taken when there is need. Supreme Court Practice, Stern & Gressman, page 676.

Should the Nevada Supreme Court state that it did not consider any Federal rights, this Court could then refer the case back to the Nevada Supreme Court for consideration of the Federal questions.

The mere fact that the Nevada Supreme Court has remained silent on the question of any Federal rights, such silence is immaterial even where the state court is not explicit in overruling a timely challenge on federal grounds. Largent v. Texas, 318 U.S. 418.

III - THE PETITION FILED IN THE STATE COURT IS SPECIFIC AND PLAIN IN POINTING OUT TO THE STATE COURT THAT THE APPLICATION OF THE STATE STATUTE OR ITS EQUIVALENCY TO THE PARTICULAR CIRCUMSTANCES OF PETITIONER MAKES THE STATUTE VOID UNDER FEDERAL LAW.

This Honorable Court has already previously established that a State Supreme Court Order may possess sufficient legislative characteristics to support an appeal. In the case of Lathrop v. Donohue, 367 U.S. 820, an order establishing an integrated state bar was found to have such characteristics. There is no dispute, therefore, as to the case at bar, inasmuch as the pertinent Nevada Supreme Court Rules are in the nature of regulation of the legal profession and therefore have legislative characteristics.

The Petition makes it clear that the Petitioner was not seeking an erosion of the Nevada scheme for the admission of officers of the Court to practice before the courts of Nevada. He was merely pressing the point that he had high academic credentials and that he met all of the high standards established by the Nevada Supreme Court for officers of the Court except the one proviso for graduation from a law school approved by the A. B. A. at the time of graduation. The fact that his law school has since won ABA approval or the fact that his law school (University of Baltimore School of Law), at the time of his attendance, was on the approved list of law schools of the State of Maryland, or the fact that at the time of his attendance in law school in Maryland the State of Nevada had no ABA law school requirement for any applicant for admission to the Nevada Bar (then SupremeCourt Rule 4) and that at that time the State of Nevada had a rule allowing bar members of sister states to be admitted without examination upon a showing of three years of active practice, were all facts that should have been considered by the Nevada Supreme Court in favor of the Petitioner.

It should have been obvious to the Nevada Supreme Court that it is of questionable rationality to insist that a practitioner of many years of good standing at the Bars of two states must be conclusively incapable of meeting the

high standards of the State of Nevada for members of the Bar merely because the Petitioner attended a law school that did not meet ABA requirements for library facilities or for lecturing by full time law professors instead of by practicing lawyers and sitting judges. The Nevada Supreme Court, in its present scheme of admission of attorneys from other states, has no provision for any hearings to determine, for example, that Petitioner used the extensive law libraries of the Bar Library of Baltimore City, the Peabody Library of Baltimore and the public libraries of the City of Baltimore as well as the law library of the University of Baltimore for his research during his student days; nor is there any provision for consideration of any facts relating to the highly qualified attorneys and sitting and retired judges that comprised the faculty of the law school while the Petitioner was a student therein. Nor is there any provision for any consideration of law books written by the Petitioner, nor the fact that he has taught admiralty law at an ABA accredited law school, Loyola University School of Law at Los Angeles, nor the fact that he is Dean of the Institute of Advanced Law Study and has taught admiralty law throughout the United States, mainly to lawyer groups. Nor is there any provision for consideration of the fact that Appellant is a member in good standing of the State Bar of Michigan, is entitled to practice in the Bar of Maryland and before the United States Supreme Court and is a member of the American Bar Association, the American Judicature Society, the Federal Bar Association and the Association of Continuing Legal Education Administrators.

It is clear from the Petition filed by Appellant in the state court that he does not argue that anyone has an absolute right to practice a pro-

fession. He merely maintains that current practitioners should have an opportunity to demonstrate, by examination, their adequacy to meet the standards. Appellant has merely sought and still seeks to protect his "liberty" and "property" interests in his profession and an opportunity to rebut the statutory presumption of his incompetence.

IV - THE UNITED STATES SUPREME COURT HAS LONG DISFAVORED IRREBUTTABLE STATUTORY PRESUMPTIONS WITH IRRATIONAL RESULTS

Appellee cites Schware v. Board of Bar Examiners, 353 U.S. 232, 239 in support of its position that "a state can require high standards of qualification as a prerequisite to admission to practice."

Appellee, unfortunately, failed to read the entire sentence, which reads:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

Mr. Justice Black, in delivering the opinion of the Court in Schware, supra, said:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

Inasmuch as the Appellant herein attended a law school approved by the State of Maryland, was admitted to the Maryland Bar in 1943 after passing the Maryland bar examination and practiced law for 19 years in both Maryland and Michigan prior to applying for admission to the Nevada Bar, it lacks

rationality to inform such an applicant for admission that there exists in the State a law that presumes him to be incompetent to practice law and that this is an irrebuttable presumption that he will never be allowed to rebut.

The Appellee contends that "Nothing in Vlandis v. Kline (412 U.S. 441) affects Nevada's right to continue to require such qualification." (Referring to the requirement that in every instance of seeking admission to the bar the applicant must be a graduate of an ABA-accredited law school.)

Vlandis v. Kline, supra is only one of a long series of cases wherein the Supreme Court of the United States has corrected injustices. For example, in Berger v. Board of Psychologist Examiners, 521 F 2d 1062, decided October 28, 1975, the Court of Appeals of the District of Columbia Circuit, in an opinion by Circuit Judge MacKinnon, held:

> "The Supreme Court has long held irrebuttable statutory presumptions to be disfavored. (Cases cited) Recently the Court has struck down irrebuttable presumptions that unmarried fathers are unqualified to raise children, Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 551 (1972); that women more than four months pregnant cannot teach school, Cleveland Board v. Lafleur, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974); and that those who apply to the Connecticut State University system as non-residents can never become residents for the purpose of paying lower in-state tuition, Vlandis v. Kline, 412 U.S. 441, 446-53, 93 S. Ct. 2230, 37 L Ed. 2d 63 (1974). "(Other cases cited).

Justice Stewart, in Vlandis, supra, made some interesting commentparticularly applicable to the case at bar. He said:

> "The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised." 412 U.S. at 451, 93 S. Ct. at 2236.

In Berger v. Examiners, supra, the U. S. Court of Appeals, relying on the Vlandis Case and many other cases following the Vlandis principle issued an order requiring the licensing examiners "to administer to appellant Berger an examination designed to determine whether his professional skill is commensurate with that of new psychogists being currently licensed under the Act."

Continuing, the decision held:

> "In so doing, we do not act as a legislature to add this requirement to the statute, but rather strike down as unconstitutional that part of the statute which requires an applicant to have an academic credential as well as a certain number of years experience in order to qualify to take a license examination. Only by this action can we remedy the constitutional defect of the statute as it is applied to Berger and to other psychologists without the requisite academic credentials but possibly possessed of the necessary skills."

V - A STATE LAW THAT IS NOT APPLIED EQUALLY TO ALL SHOULD BE STRUCK DOWN AS UNCONSTITUTIONAL

When a State law is applied in such manner as to be made applicable to certain individuals and not to others, such a law is clearly in violation of the Fourteenth Amendment and must be struck down.

Page 4 of the Petition, Lines 14 to 20, tell of two applicants for admission to the Nevada Bar who have not graduated from ABA-approved law schools and who were admitted to the Nevada bar examination and subsequently to the Nevada bar for the practice of law. In both cases, this was done with the full knowledge and approval of the Nevada Supreme Court.

In Barbier v. Connolly, 113 U.S. 27, the Court held, in a case involving equal protection of the laws guaranteed by the Fourteenth Amendment:

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In the case at bar, two other men, both now practicing law, were admitted to practice despite the fact that they had not graduated from ABA-approved law schools. One of them had never even been admitted to practice law in any other State and was totally without any legal experience, whereas Appellant had practiced law in both Maryland and Michigan before moving to Nevada and has been denied admission to the Nevada bar examination.

Are the words of the 14th Amendment meaningless? It is said that the people of the U.S.S.R. have beautiful guaranties of liberty written into their Constitution or equivalent documents but that the guaranties are never enforced.

BEST COPY AVAILABLE

VI - APPELLEE MAKES THE POINT THAT OR CLAIM THAT THE QUESTIONS PRESENTED ARE "UNSUBSTANTIAL".

Appellant respectfully represents to this Honorable Court, in response to this contention, that the right of Appellant to earn his livelihood in his chosen profession, of which he has been a participant for almost thirty three (33) years is a substantial question.

The matter of a right to earn a livelihood is certainly not a frivolous matter and is of great importance and substance.

Furthermore, Appellant believes that the United States Supreme Court has never previously passed on the question of the right of a seasoned attorney, moving from one state to another, to be allowed to establish his competency as an attorney despite the existence of some arbitrary academic requirement that would seem to bar him from practice. Thus, it cannot be said that prior decisions of the Supreme Court leave no room for real controversy, as was pointed out in the case of Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311.

In the Berger Case, supra, the opinion of the U. S. Court of Appeals dealt with a case of a professional practitioner without any meaningful grandfather rights. The Court applied the Vlandis principle and ordered an examination for the practitioner. In doing so, however, the Court commented:

> "The federal courts have apparently not considered the issue we confront in this case, but at least one state court has entertained a similar claim and has reached a virtually identical conclusion."

The question was apparently not explicitly foreclosed by prior decisions of the U. S. Supreme Court so as to leave no room for controversy.

CONCLUSION

Appellant respectfully suggests that the case at bar meets all of the requirements for the exercise of the appellate jurisdiction of this Honorable Court and that probable jurisdiction should be noted and the case placed on the hearing docket.

Respectfully submitted,

JOSEPH M. KADANS
Attorney for Appellant
in pro se

CERTIFICATE OF SERVICE

Joseph M. Kadans, a member of the Bar of the UnitedStates SupremeCourt, hereby certifies that three copies of the foregoing Brief were left at the office of Samuel S. Lionel, Esq., Attorney for Appellee, First National Bank Building, Las Vegas, Nevada on the 19th day of March, 1976.

JOSEPH M. KADANS